UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

OLASUPO OGUNMOKUN,

Plaintiff,

v.

XPRESS LOAN SERVICING aka CIT GROUP and AMERICAN EDUCATION SERVICES/PHEAA,

Defendants.

12 CV 4403 (RRM)(JO)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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I. INTRODUCTION

In this lawsuit, *pro se* plaintiff Olasupo Ogunmokun seeks to hold defendant Pennsylvania Higher Education Assistance Agency d/b/a American Education Services ("PHEAA"), a state agency that guarantees federally insured student loans, liable for its effort to recoup the student loan debt that Plaintiff owes. Plaintiff obtained a Federal Family Education Loan Program consolidation loan in 2007, defaulted in 2008, and has never made a payment.

Plaintiff complains that PHEEA's collection effort as a whole has been unjustified because the loan, he asserts, was fraudulently procured without his consent. He singles out PHEAA's certification of Plaintiff to the federal Treasury Offset Program (resulting in offsets to Plaintiff's tax refunds) and PHEAA's reporting of the defaulted loan status to the major credit reporting agencies. Plaintiff brings common law claims and a statutory claim under the federal Fair Credit Reporting Act against PHEAA. He seeks both discharge of his loan obligation and money damages.

PHEAA is entitled to an order pursuant to Fed. R. Civ. P. 12(b)(6) dismissing all claims against it for several reasons:

First, Plaintiff has not alleged any conduct attributable to PHEAA that is wrongful. As the guarantor of Plaintiff's federally insured student loan, PHEAA is required by federal law to engage in an array of collection efforts to recoup defaulted student loan debt, specifically including tax offsets and reporting to the credit agencies. Plaintiff has simply not alleged any unlawful or actionable conduct, and therefore, has failed to state a plausible claim for relief against PHEAA. Furthermore, Plaintiff has not alleged facts that could support liability under the Fair Credit Reporting Act. The mere reporting of information to the credit agencies, whether accurate or inaccurate, is not actionable under the statute.

Second, Plaintiff's state law claims are preempted. The federal regulations enumerating the collection activity that guaranty agencies like PHEAA must take to recoup defaulted student loan debt expressly preempt state claims concerning such collection activity.

Third, Plaintiff's claims are premature because he has failed to exhaust the administrative remedies available to him. As this Court acknowledged in *Carlin v. CBE*, a student loan borrower seeking discharge of his student loans must avail himself of the administrative process outlined in the regulations governing federally insured student loans before commencing suit.[1] Similarly, a borrower challenging the imposition of federal tax offsets must also comply with the administrative procedures outlined in the federal regulations before commencing suit.[2] Because Plaintiff has failed to pursue the administrative route first, this lawsuit should be dismissed.

II. STATEMENT OF FACTS

A. Procedural History

Pro se plaintiff Olasupo Ogunmokun commenced this action on August 31, 2012. Plaintiff's Fifth Amended Complaint, filed on July 17, 2013, is the operative pleading and the subject of this motion to dismiss.

Plaintiff's chief claim in this lawsuit is that he has no obligation to make payment on a consolidation student loan he obtained in 2007 because it was allegedly procured by the fraudulent conduct of non-party Richard A. Preisig / University Student Services ("University Student Services"). University Student Services was the primary named defendant in this action

[1] *Carlin v. CBE*, 2008 U.S. Dist. LEXIS 40396, *4 (E.D.N.Y. May 19, 2008).

[2] *See Bowers v. Pa. Higher Educ. Assistance Agency*, 2011 U.S. Dist. LEXIS 84789, **9-10 (S.D.N.Y. July 29, 2011).

until the Court dismissed the claims against it under Fed. R. Civ. P. 4(m) for failure to effect timely service.[3]

B. The Factual Allegations

1. Plaintiffs' FFELP Consolidation Loan

In 2007, Plaintiff took a job with University Student Services, a company involved in the student loan consolidation business.[4] As part of what Plaintiff understood to be a training simulation for his position as a loan consolidation agent, University Student Services asked Plaintiff to walk through the process of filling out an application and promissory note for a Federal Family Education Loan Program ("FFELP") consolidation loan,[5] and to coordinate processing with the Department of Education ("DOE").[6] University Student Services asked Plaintiff to supply his own personal biographical and student loan details in completing the paperwork for the loan, which he did.[7] Whatever hesitation Plaintiff had in supplying this information was allayed by University Student Services' assurance that the application would not be processed.[8]

Contrary to University Student Services' assurances, and for reasons that Plaintiff attributes to University Student Services' fraud, the DOE did in fact process Plaintiff's application and promissory note, and approved a FFELP consolidation loan, with defendant Xpress Loan Servicing ("Xpress Loan") serving as the lender and defendant PHEAA serving as the guaranty agency.[9] According to the Complaint, Plaintiff first learned that the FFELP consolidation loan had been approved and disbursed when he received Xpress Loan's introductory package in the mail on August 4, 2007.[10]

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[3] Order, dated June 25, 2013.

[4] Compl. at ¶¶ A, B.

[5] FFELP, established under Part B of the Higher Education Act of 1965, 20 U.S.C. § 1071 *et seq*., provides a number of financial assistance programs to students. One such program is the FFELP Consolidation Loan program, which allows a borrower to consolidate multiple existing student loan obligations with one lender. FFELP loans are provided by private lenders, insured by guaranty agencies, and reinsured by the federal government. *see generally Carlin v. CBE*, 2008 U.S. Dist. LEXIS 40396, *2, n.1 (E.D.N.Y. May 19, 2008) (describing FFELP); *Shabtai v. United States Dep't of Education*, 2003 U.S. Dist. LEXIS 14398, **1-2 (S.D.N.Y. Aug 20, 2003) (same); *Pro Sch., Inc. v. Riley*, 824 F. Supp. 1314, 1316 (E.D. Wis. 1993) (same).

[6] Compl. at ¶¶ B, C, D.

[7] Compl. at ¶¶ C, E.

[8] Compl. at ¶ C.

Plaintiff claims that University Student Services' training simulation was nothing more than a ruse designed to dupe Plaintiff into consolidating his student loans and that the consolidation loan is, as a result, invalid.[11]

2. Plaintiff's Loan Default and PHEAA's Collection Efforts

From the outset, Plaintiff has refused to acknowledge the loan or his payment obligations thereunder.[12] Accordingly, due to his failure to make payment, Xpress Loan reported his payment delinquencies to the major credit reporting agencies in November 2007.[13]

Due to further non-payment, Plaintiff's loan entered default status in 2008, and Xpress Loan filed a claim on the loan guaranty. PHEAA paid the default claim and took assignment of the defaulted loan from Xpress Loan.[14]

Federal law requires PHEAA and other guaranty agencies to employ an array of collection efforts to recoup student loan debt from borrowers in default of FFELP loans.[15] The regulations covering the collection requirements of guaranty agencies are found at 34 C.F.R. § 682.410(b)(6) and enumerate the required collection actions, which include a sequence of dunning letters and telephone contacts, reporting the defaulted loan to credit bureaus, federal and state income tax refund offsets, non-judicial administrative wage garnishment, and, where appropriate and authorized, collection litigation.[16]

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[9] Compl. at ¶¶ F, L. PHEAA is a statutorily-created instrumentality of the Commonwealth of Pennsylvania, *see* 24 PA. STAT. ANN. §§ 5101.1-5199.9, that serves as, among other thing, a guaranty agency for FFELP loans. A "guaranty agency" is defined in the FFELP regulations as "[a] state or private nonprofit organization that has an agreement with the Secretary under which it will administer a loan guarantee program under the [Higher Education] Act." 34 C.F.R. § 682.200.

[10] Compl. at ¶ F.

[11] *See generally* Compl.

[12] Compl. at ¶¶ F, G, J, L, V. Plaintiff does not claim that the underlying student loans that were combined to form the consolidation loan are invalid.

[13] Compl. at ¶ H.

[14] Compl. at ¶ L.

PHEAA employed the collection actions required by federal law with respect to Plaintiff's defaulted consolidation loan, including certification of Plaintiff to the federal Treasury Offset Program, which resulted in offsets to Plaintiff's 2009 and 2011 federal tax refunds (total of approximately $1195.00).[17] Plaintiff's consolidation loan remains in default status.

3. Plaintiff's claims against PHEAA

To be clear, Plaintiff makes no claim that PHEAA (or Xpress Loan) had anything to do with the alleged fraud that University Student Services perpetrated upon him in procuring the consolidation loan. Rather, Plaintiff alleges that PHEAA is liable to him for refusing to acquiesce to his demands to discharge his loan obligation, for pursuing its collection efforts, and for failing to investigate adequately his charge that he was defrauded by University Student Services. Specifically:

(continued...)

[15] *See* 34 C.F.R. § 682.410(b)(6); *Chae v. SLM Corp.*, 593 F.3d 936, 939 (9th Cir. Cal. 2010) ("the guaranty agency must take diligent steps to recover the default amount"); *Watkins v. Educ. Credit Mgmt. Corp.*, 2011 U.S. Dist. LEXIS 55328, *12 (E.D. Va. May 12, 2011) ("the guaranty agency is authorized-indeed, required-by federal law to commence collection efforts specified by federal regulations against the borrower").

[16] *See* 34 C.F.R. § 682.410(b)(6).

[17] Compl. at ¶¶ N, R, p. 12. Administered by the United States Department of Treasury, the Treasury Offset Program collects delinquent debts owed to federal agencies and states pursuant to 26 U.S.C. § 6402(d) and 31 U.S.C. § 3720A. *See United States v. Hunter*, 2007 WL 2122052, *2, n.10 (E.D.N.Y. 2007).

In Counts 3, 4, and 5, styled as causes of action for "Conversion," Plaintiff asserts that PHEAA's debt collection activities, and in particular, PHEAA's engagement of several debt collection agencies to assist with those activities, was wrongful and caused him injury.[18]

In Count 6, styled as a cause of action for "Fraudulent Imposition of Pecuniary Loss," Plaintiff claims that PHEAA's certification of Plaintiff to the Treasury Offset Program was wrongful and caused him injury.[19]

In Count 7, Plaintiff claims that PHEAA violated the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*., by reporting Plaintiff's default loan status to the major credit reporting agencies in 2010 and by inadequately investigating Plaintiff's claims he was defrauded by University Student Services.[20]

Plaintiff seeks money damages, and discharge of the consolidation loan. While discharge is not expressly pled in the Complaint, during the June 24, 2013 status conference before Magistrate Judge Orenstein, Plaintiff reported that he was indeed seeking discharge.

III. ARGUMENT

A. The Motion To Dismiss Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[21] A complaint is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[22] "'[L]abels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'"[23]

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[18] *See* Compl. at Count 3.

[19] *See* Compl. at Count 6.

[20] *See* Compl. at Count 3, ¶ P.

[21] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

The Second Circuit has explained that, after *Twombly*, the Court's inquiry under Rule 12(b)(6) is guided by two principles. [24] "First, although 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' 'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" [25] "'Second, only a complaint that states a plausible claim for relief survives a motion to dismiss' and '[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'"[26]

B. Plaintiff Does Not Plead Factual Content Sufficient To Allow The Court to Draw A Reasonable Inference That PHEAA Is Liable For Any Actionable Misconduct

At the most basic level Plaintiff's claims against PHEAA are deficient and must be dismissed because Plaintiff has alleged no facts from which it can be reasonably inferred that PHEAA engaged in any wrongful conduct that could possibly subject it to liability. Plaintiff has not stated plausible claims for relief.

Plaintiff broadly casts PHEAA's debt collection efforts as unlawful, but, as discussed above, this conduct is not just authorized, but expressly required by the federal FFELP regulations. There is no allegation that PHEAA failed to conform its debt collection activities to the requirements of the law, nor is there even a suggestion that PHEAA (or any of the debt collection agencies that assisted with its efforts) engaged in any untoward conduct (*e.g.*, unfair, deceptive or abusive debt collection practices). Plaintiff complains specifically about PHEAA's certification of his debt to the Treasury Offset Program, but this conduct too is explicitly required by the FFELP regulations. Accordingly – and apart from the fact that a cause of action for "conversion" has nothing to do with the facts of this case and "fraudulent imposition of pecuniary loss" is not a recognized cause of action – Plaintiff has not alleged sufficient facts to support Counts 3, 4, 5, or 6, the common law claims based on PHEAA's debt collection efforts.

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[22] *Iqbal*, 556 U.S. at 678.

[23] *Id*. (quoting *Twombly*, 550 U.S. at 555).

[24] *Harris v. Mills*, 572 F.3d 66 (2d Cir. 2009).

[25] *Id*. at 72.

[26] *Id*. (quoting *Iqbal*, 556 U.S. at 679).

Plaintiff has also failed to allege facts that could support liability under the federal Fair Credit Reporting Act ("FCRA") based on purported communications to the credit reporting agencies regarding the status of Plaintiff's consolidation loan. First, there is no allegation that any reporting PHEAA made was inaccurate. Second, even if there were inaccurate reporting, such conduct is not actionable. There is no private right of action against a data furnisher simply for reporting information to a credit reporting agency, even if the information is inaccurate.[27] As one court recently remarked "[i]t can be inferred from the structure of the [FCRA] that Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished."[28]

The FCRA only affords borrowers a private right of action against data furnishers in circumstances where the data furnisher has been informed of a consumer dispute as to the completeness or accuracy of credit information it reported previously and the data furnisher then fails to investigate that dispute properly.[29] Thus, to make out an FCRA claim against PHEAA, Plaintiff must allege that he notified a credit reporting agency of a disputed credit item, that the credit reporting agency then notified PHEAA, and that PHEAA then failed to investigate or rectify the disputed charge.[30]

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[27] *See Eiland v. United States Dep't of Educ.*, 2011 U.S. Dist. LEXIS 741, **8-9 (S.D.N.Y. Jan. 4, 2011) ("[C]laim under the FCRA is also barred because that statute does not provide a private right of action against furnishers of inaccurate information to consumer reporting agencies."); *see also Ogle v. Bac Home Loans Servicing LP*, 2013 U.S. Dist. LEXIS 19986, *20 (S.D. Ohio Feb. 14, 2013) (no private right of action under FRCA for falsely reporting negative information to credit reporting agencies); *Mavilla v. Absolute Collection Serv.*, 2013 U.S. Dist. LEXIS 3925, *17 (E.D.N.C. Jan. 10, 2013) ("There is no private right of action to remedy an alleged breach by the furnisher to provide correct and complete consumer credit information to a CRA").

[28] *Dabney v. Total Relocation Servs.*, LLC, 2013 N.J. Super. Unpub. LEXIS 54, 12 (App.Div. Jan. 8, 2013).

In the Complaint, Plaintiff alleges that he advised the credit reporting agencies in November 2007 that he "disputed" the information that Xpress Loan provided about his loan status,[31] but there is no allegation that Plaintiff ever "disputed" information that *PHEAA* provided to the credit reporting agencies, much less that that any credit reporting agency notified PHEAA of any dispute.

At its core, Plaintiff's dispute with PHEAA appears to be simply that PHEAA did not accept Plaintiff's word that University Student Services hoodwinked Plaintiff into consolidating his loans and agree to abstain from collection activity. Simply put, this conduct does not give rise to any legal claim. PHEAA has no obligation to blindly accept Plaintiff's asserting that he was defrauded. Instead, its obligation has been and continues to be to diligently pursue collection on defaulted student debt, as mandated by federal law.

C. Federal Law Preempts Plaintiff's State Law Claims

Even if the Complaint contained sufficient allegations of actionable conduct, Plaintiff's state law claims against PHEAA require dismissal because they are preempted.

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[29] 15 U.S.C. 1681s-2(c).

[30] *See Beisel v. ABN Ambro Mortg.*, 2007 U.S. Dist. LEXIS 59234,** 3-4 (E.D. Pa. Aug. 10, 2007).

[31] *See* Compl. at ¶ I. Plaintiff's assertion in this paragraph that the credit reporting agencies notified PHEAA of his dispute of Express Loan's reporting is conclusory and unsupported by a single alleged fact. Further, it is extremely implausible that PHEAA would have received any information from the credit bureaus regarding Plaintiff in 2007, which is before Plaintiff's loan went into default and before PHEAA's guaranty obligation was triggered. Regardless, PHEAA has no obligation under the FCRA to investigate the accuracy of disputed information provided by someone other than PHEAA.

As discussed, federal law mandates that guarantors of FFELP loans such as PHEAA employ collection efforts to recoup student loan debt from borrowers in default.[32] To effectuate this goal, the federal regulations concerning FFELP expressly preempt state law claims concerning such collection efforts. 34 C.F.R. § 682.410(b)(7) provides:

> Preemption of State law. The provisions of paragraphs (b) (2), (5), and (6) of this section preempt any State law, including State statutes, regulations, or rules, that would conflict with or hinder satisfaction of the requirements of these provisions.

The Secretary of Education has also interpreted the Higher Education Act as preempting any state laws in conflict with the collection activities of guaranty associations such as PHEAA:

> The Secretary interprets regulations issued for the Stafford Loan Program (formerly the Guaranteed Student Loan Program), the Supplemental Loans for Students (SLS) Program, the PLUS Program, and the Consolidation Loan Program, collectively referred to as the Guaranteed Student Loan (GSL) Programs, that prescribe the actions lenders and guarantee agencies must take to collect loans guaranteed under the GSL Programs. The substance of the interpretation is that these regulations preempt State law regarding the conduct of these loan collection activities. [33]

Given the express preemption embodied in the FFELP regulations, Plaintiff's claims which seek to impose state law liability for PHEAA's actions taken pursuant to the federal regulations must be dismissed.

In Counts 3 – 5 of the Complaint, Plaintiff claims he suffered injury as a proximate result of PHEAA's efforts to collect on the defaulted student loan debt via enlistment of third-party debt collection agencies NextStudent Loans, Diversified Collection Services, and

[32] *See* 34 C.F.R. § 682.410(b)(6).

[33] 55 Fed.Reg. § 40120-01 (Oct. 1 1990).

Account Control Technology.[34] In Count 5, Plaintiff claims he suffered injury as a result of PHEAA's certification of Plaintiff to the Treasury Offset Program and the resulting offsets of his federal tax refunds. These counts squarely implicate the collection activities that are not just authorized, but mandated by 34 C.F.R. § 682.410(b)(6) – PHEAA must pursue the recoupment of defaulted student debt (and may employ debt collection agencies to do so)[35] and it must pursue tax offsets. The express preemption provision of 34 C.F.R. § 682.410(b)(7) forecloses any potential state law liability for PHEAA's debt collection activities and mandates dismissal of counts 3, 4, 5, and 6.

D. Dismissal is Warranted Because Plaintiff Has Not Exhausted the Administrative Remedies Available to Him

1. Plaintiff's failure to exhaust the administrative remedies provided by 34 C.F.R. § 682.402(e)

It is a well-established rule of judicial administration that "no one is entitled to judicial relief. . . until the prescribed administrative remedy has been exhausted."[36] Where relief is available from an administrative agency, a plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.[37] A party's failure to exhaust administrative remedies deprives the trial court of subject matter jurisdiction over the action.[38]

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[34] Notably, Plaintiff does not allege that PHEAA (or these collection agencies) engaged in any alleged wrongful conduct, but simply that they pursued attempt to recoup the debt.

[35] *See* 34 C.F.R. § 682.410(b)(ii)(D)(2) (noting that the collection charges a guaranty agency may charge a borrow may include "collection agency charges"); *Namee, Lochner, Titus & Williams, P.C. v. Higher Educ. Assistance Found.*, 50 F.3d 120, 122 (2d Cir. 1995) (noting that the regulations provide for the guaranty agencies' use of "collection contractors").

[36] *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

[37] *Reiter v. Cooper*, 507 U.S. 258, 269 (1993); *Bowers v. Pa. Higher Educ. Assistance Agency*, 2011 U.S. Dist. LEXIS 84789, **9-10 (S.D.N.Y. July 29, 2011).

[38] *Schlude v. Northeast Central Sch. Dist.*, 892 F. Supp. 560, 564 (S.D.N.Y. 1995).

As this Court recognized in *Carlin v CBE*, a plaintiff arguing that his student loans should be discharged must first avail himself of the administrative process outlined in 34 C.F.R. § 682.402(e) before filing suit.[39] Subsection (e)(3)(v) specifically pertains to borrowers seeking discharge on account of identity theft (which is effectively what Plaintiff asserts here), and requires such borrowers to submit a written request and sworn statement to the holder of the note (to be forwarded to the guaranty agency) certifying various matters regarding the identity theft, and also to provide a copy of "a local, State, or Federal court verdict or judgment that conclusively determines that the individual who is named as the borrower of the loan was the victim of a crime of identity theft by a perpetrator named in the verdict or judgment."[40] After review of the request, should the guaranty agency determine that the borrower does not qualify for discharge, the borrower may appeal directly to the Secretary of Education.[41] If the borrower is unhappy with the Secretary's decision, judicial review is available under the Administrative Procedure Act.[42]

As Plaintiff has not complied with the administrative process of 34 C.F.R. § 682.402(e), which he acknowledges in his Complaint,[43] dismissal of the Complaint is appropriate.

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[39] *Carlin v. CBE*, 2008 U.S. Dist. LEXIS 40396, *4 (E.D.N.Y. May 19, 2008).

[40] 34 C.F.R. § 682.402(e)(3)(v).

[41] *Carlin* at *4.

[42] *Id.* at **4-5 (citing 5 U.S.C. § 701, *et seq.*).

[43] Compl. at pp. 8-9. Plaintiff argues in his Complaint that the requirement that administrative remedies be exhausted prior to filing suit should be waived because this is an "extraordinary" case. Compl. at p. 9. This doctrine of judicial administration recognizes no such exception.

2. Plaintiff's failure to exhaust the administrative remedies provided by 34 C.F.R. § 682.410(b)

Separate from the administrative process available to borrowers seeking loan discharge, there is an administrative process available to borrowers who challenge tax offsets.

Under 34 C.F.R. § 682.410(b), a borrower in default facing a tax offset has an opportunity to review records and to request an administrative hearing.[44] Indeed, the Higher Education Act affords debtors in default an absolute right to an administrative hearing "concerning the existence or the amount of the debt" or "the terms of the repayment schedule,"[45] and guaranty agencies must provide this hearing "upon request."[46] Even "if an untimely request for a hearing is made, a hearing must be provided."[47] That is to say, at any time, even today, Plaintiff could request a hearing, and PHEAA would be obligated under the Higher Education Act to provide it.

When a student loan debtor asserts legal claims challenging offsets under the Treasury Offset Program without having first sought administrative review, the claim must be dismissed for failure to exhaust administrative remedies.[48] In a directly analogous case, *Bowers v. Pa. Higher Educ. Assistant Agency*, a student loan borrower in default brought claims against PHEAA challenging, *inter alia*, referral of her loan to the Treasury Offset Program and resulting garnishment of her federal tax refund.[49] The court granted PHEAA's motion to dismiss on the ground that since the plaintiff had not requested the appropriate administrative hearing before filing suit, she had not exhausted the administrative remedies available to her.[50] Here too, because Plaintiff has never requested a hearing to protest the treasury offset resulting from his loan default, dismissal of Count 6 is warranted.

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[44] 34 C.F.R. 682.410(b)(5)(ii)(A), (b)(5)(vi), (b)(6)(v); *Bowers*, 2011 U.S. Dist. LEXIS 84789, at *10.

[45] 20 U.S.C. § 1095a(a)(5); 34 C.F.R. § 682.410(b)(9).

[46] 20 U.S.C. § 1095a(b).

[47] *Green v. Kentucky Higher Educ. Assistance Auth.*, 78 F. Supp. 2d 1259, 1263 (S.D. Ala. 1999); *see Savage v. Scales*, 310 F. Supp. 2d 122, 136 (D.D.C. 2004) (noting that despite debtor's failure to timely request a hearing "the Act specifically provides a mechanism through which plaintiff may still request a hearing."); *see also* 34 C.F.R. § 682.410(b)(5)(iv)(A).

[48] *Shlikas v. United States Dep't of Educ.*, 2013 U.S. Dist. LEXIS 69265, at *20 (D. Md. May 14, 2013) ("TOP offsets are subject to the general requirement of exhaustion before judicial review."); *United States v. Beulke*, 892 F. Supp. 2d 1176, 1187 (D.S.D. 2012) (plaintiff challenging referral to TOP "must exhaust administrative remedies before seeking redress in court.").

IV. CONCLUSION

For these reasons, and pursuant to Fed. R. Civ. P. 12(b)(6), the Court should dismiss each and every one of Plaintiffs' claims against PHEAA.

Dated: July 26, 2012

Respectfully submitted,
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[49] *Bowers*, 2011 U.S. Dist. LEXIS 84789, at *15.

[50] *Id.* The Court in *Bowers* also found that dismissal was warranted because the Higher Education Act, the statute under which the plaintiff purported to assert a claim, does not provide a private right of action. *Id.* at *9.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

OLASUPO OGUNMOKUN, Plaintiff, v. XPRESS LOAN SERVICING aka CIT GROUP and AMERICAN EDUCATION SERVICES/PHEAA, Defendants.	12 CV 4403 (RRM)(JO)

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2013, I caused a true and correct copy of defendant Pennsylvania Higher Education Assistance Agency Motion to Dismiss, Memorandum of Law in Support of Motion to Dismiss, and copies of the cases cited in the Memorandum of Law to be served via Federal Express and email upon Plaintiff, as follows.

Olasupo Ogunmokun
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I further certify that on July 26, 2013, I caused a true and correct copy of defendant Pennsylvania Higher Education Assistance Agency Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss to be served via e-mail upon counsel for defendants Xpress Loan Servicing and CIT Group Inc. as follows.

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